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Supreme Court, U.S.
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No. 03-1141

In the Supreme Court of the United States

BRENT GISSLEN,

Petitioner,

v.

CITY OF CRYSTAL, MINNESOTA, a municipality, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR REHEARING

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PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI

Petitioner hereby moves, pursuant to Rule 44.2 of the Supreme Court Rules, for rehearing on his petition for writ of certiorari. In support thereof, Petitioner makes the following arguments: intervening decisional caselaw by sister Circuit Courts conflict with the Eighth Circuit's decision in this case regarding the standard for determining when a state decision is "inextricably intertwined" under the Rooker-Feldman analysis to deprive federal courts of subject matter jurisdiction in causes of action under 42 U.S.C. Sections 1983, 1985 and 1986. In addition, the Eighth Circuit issued Johnson v. City of Shorewood, 360 F.3d 810 (8th Cir. 2004), on March 5, 2004, relying upon the Gisslen holding that the plaintiffs were seeking the same remedy in state court as in federal court: just compensation. Gisslen, however, sought compensatory damages in federal court for constitutional violations of free speech, equal protection and substantive due process as well as punitive damages. This also conflicts with the Eighth Circuit's suggestion that Gisslen could, and should, have added his new Section 1983, 1985 and 1986 claims and added Joselyn, Dulgar and Mathisen as parties in the state court case. This Court needs to clarify and articulate a uniform Rooker-Feldman analysis so that plaintiffs such as Gisslen, with viable federal claims, are afforded the jurisdiction of the federal courts when they have had no prior opportunity to raise their claims.

REASONS FOR GRANTING THE PETITION FOR REHEARING

1. Intervening and Conflicting Decisions by Sister Circuits Continue to Apply Inconsistent Criteria for Denying Subject-Matter Jurisdiction Under Rooker-Feldman.

A. "Inextricably intertwined" inexplicably applied inconsistently.

Since Gisslen filed his petition for a writ of certiorari on February 4, 2004, a number of other Circuit Courts of Appeals have applied the Rooker-Feldman doctrine in a conflicting and inconsistent manner that results in some plaintiffs being denied their day in court for lack of subject-matter jurisdiction and others allowed to proceed. Rehearing in this case is necessary to plug the hole in the bursting dyke of inconsistency among lower federal courts interpreting Rooker-Feldman. Construction of federal law and application of Rooker-Feldman for federal subject-matter jurisdiction should be uniform among the Circuits but it is not. Because the Circuit Courts of Appeals continue to apply Rooker-Feldman inconsistently it is incumbent upon this Court to resolve the conflicts and clarify a uniform standard if it continues to be applied.

On February 6, 2004, the Tenth Circuit held in Pittsburg County v. City of McAlester, et al, 358 F.3d 694 (10th Cir. 2004), that the Rooker-Feldman jurisdictional bar has been applied to two categories of claims, those: (1) actually decided by a state court, or (2) "inextricably intertwined" with a state court judgment. Id at 707. To apply the "inextricably intertwined" standard, the Tenth Circuit inquired "whether the injury alleged by the federal plaintiff resulted from the state court judgment itself or is distinct from that judgment." Id; (Quoting from Gary v.

Geils, 82 F. 2d 1362, 1365 (7th Cir. 1996)). The Tenth Circuit addressed whether the state-court judgment caused, actually or proximately, the injury for which the federal plaintiff seeks redress. Id; Kenman Eng'g v. City of Union, 314 F. 3d 468, 476 (10th Cir. 2002). If it did, Rooker-Feldman deprives the federal court of jurisdiction; if it did not, Rooker-Feldman provides no bar. Pittsburg County, 358 F.3d at 707.

This approach differs significantly from the Eighth Circuit's analysis for Gisslen. Applying the Tenth Circuit's approach to Gisslen shows great disparity from the Eighth Circuit's use of Rooker-Feldman. Under the first prong, Gisslen's federal civil rights violations were not actually decided by the state court. Next, Gisslen's Section 1983, 1985 and 1986 claims against individuals Joselyn, Dulgar and Mathisen would not have resulted from the state court condemnation judgment itself and are distinct from the judgment. It would have been impossible for Gisslen to allege in the condemnation case that Joselyn, Dulgar and Mathisen violated his federal civil rights by a condemnation judgment that had not been entered. His federal complaint does not seek to invalidate the state court judgment. Gisslen has not requested that the condemnation judgment be changed. The remedies for Section 1983, 1985 and 1986 claims including compensatory damages, emotional distress, and punitive damages, were not available in the state condemnation case. Eminent domain damages were solely limited to the value of the property taken from Gisslen by the City and did not cover the panoply of compensatory damages for constitutional violations. Unfinished condemnation proceedings were not the proper forum for Gisslen's constitutional claims. Gisslen's injuries from Joselyn, Mathisen and Dulgar could not have resulted from the condemnation judgment itself if he were required to add his

constitutional claims against them in the state case as suggested by the Eighth Circuit. Such a requirement is not part of the inextricably intertwined analysis of the Tenth Circuit.

The Tenth Circuit subsequently looked at the "inextricably intertwined" test of Rooker-Feldman again in Merrill Lynch Business Financial Services, Inc. v. Nudell, 2004 U.S. App. LEXIS 7063 (April 12, 2004). To discern whether the "inextricably intertwined" standard applied, the Court asked:

> whether the injury alleged by the federal plaintiff resulted from the state court judgment itself or is distinct from that judgment. Three related concepts – injury, causation, and redressability – inform this analysis. In other words, we approach the question by asking whether the state-court judgment caused, actually and proximately, the injury for which the federal- court plaintiff seeks redress. Kenman Eng., 314 F. 3d at 476 (internal citations and quotations omitted).

Merrill Lynch at *7-8.

Under Pittsburg County, a dismissal on the merits does not trigger application of the inextricably intertwined test. Merrill Lynch, at*8; Pittsburg County, 358 F. 3d at 707 (holding that because the state court did not reach the plaintiff's federal claims on the merits, the federal "claims do not result from the state court judgments dismissing [them]"). Thus, the "inextricably intertwined" test is not satisfied when a federal plaintiff brings claims that the state court did not review on the merits. Merrill Lynch, at *8; Pittsburg County, at 708 n.3.

In between Pittsburg County and Merrill Lynch the Ninth Circuit handed down Kougasian v. TMSL, Inc., 359 F. 3d 1136 (9th Cir. 2004), once more articulating its view of the

"inextricably intertwined" analysis. The Ninth Circuit recognized the disparity of how its sister circuits have interpreted the "inextricably intertwined" language of Rooker-Feldman more broadly. Kougasian, supra; *see e.g.*, Moccio v. New York State Office of Court Admin., 95 F.3d 195, 199-200 (2d Cir. 1996)("We agree that the Supreme Court's use of 'inextricably intertwined' means, at a minimum, that where a federal plaintiff had an opportunity to litigate a claim in a state proceeding (as either the plaintiff or defendant in that proceeding), subsequent litigation of the claim will be barred under the Rooker-Feldman doctrine if it would be barred under the principles or preclusion."); Wang v. New Hampshire Bd. of Registration in Med., 55 F.3d 698, 703 (1st Cir. 1995)(dismissing due process challenge to revocation of a medical license as inextricably intertwined with a state court judgment affirming revocation of the license on the merits); *see also* Bechtold v. City of Rosemount, 104 F.3d 1062, 1065-66 (8th Cir. 1997). According to the Ninth Circuit, "[s]uch a broad meaning of the phrase "inextricably intertwined", however, is not warranted by the Supreme Court's decision in Feldman, where the phrase originated. Kougasian, supra. Nor is it warranted by the function of the Rooker-Feldman doctrine in our federal system. Id.

B. Legal Wrong Caused by Adverse Party Does Not Trigger Rooker-Feldman

The premise for the operation of the "inextricably intertwined" test in Feldman is that the federal plaintiff is seeking to bring a forbidden de facto appeal. Noel v. Hall, 341 F.3d 1148, 1158 (9th Cir. 2003). Where a federal plaintiff does not complain of a legal injury caused by a state court judgment, but rather of a legal injury caused by an adverse party, Rooker-Feldman does not bar jurisdiction. Id at 1163. In Kougasian, the Ninth Circuit explained its

rationale behind why the inextricably intertwined test does not prevent a federal plaintiff from ever raising issues and claims not raised in state courts:

> But the "inextricably intertwined" test does not mean that a federal plaintiff can never raise issues that are "inextricably intertwined" with issues already decided in completed state court litigation. If that were so, Rooker-Feldman would give greater preclusive effect to state court judgments than the states themselves would give those judgments. Such super-preclusive effect would violate the requirement of 28 U.S.C. Section 1738 that federal courts give the same (not more or less) preclusive effect the rendering state courts would give to those judgments. *See, e.g.* Kremer v. Chemical Constr. Corp., 456 U.S. 461, 72 L.Ed. 2s 262, 102 S.Ct. 1883 (1982); Noel, 341 F.3d at 1160. Similarly, if the "inextricably intertwined" test means that a federal plaintiff cannot raise issues in simultaneous ongoing state court litigation, Rooker-Feldman would prevent the parallel state and federal litigation that is one of the hallmarks of our federal system. *See, e.g.*, Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281, 295, 26 L.Ed. 2d 2354, 90 S.Ct. 1739 (1970); Green v. City of Tuscon, 255 F.3d 1086, 1097-98 (9th Cir. 2001)(en banc); Noel, 341 F.3d at 1159.

Gisslen asserted legal wrongs against Joselyn, Dulgar and Mathisen, as well as the City, based upon violation of federal laws, not state condemnation statutes. The state court did not address or decide any federal issues or claims between the City and Gisslen. Joselyn, Dulgar and Mathisen were not parties to the condemnation case and had no interest in Gisslen's property or determination of its value. Their motivations towards Gisslen were never litigated nor did a

reasonable opportunity to do so exist. Gisslen's claims that they violated his federal civil rights was not germane to the condemnation case.

Some significant facts supporting Gisslen's Section 1983, 1985 and 1986 claims arose after the taking portion and appeal of the commissioner's award in the condemnation proceedings and were never part of that case. For example, Gisslen continued to complain about illegal pumping of water by the City between watershed districts, the City entertained a proposal by developers at the Gisslen land site for town homes, the City's sale of adjacent land to private developers for use other than park and open space, and depositing of street sweepings on Gisslen's property. These events occurred **after** the taking of Gisslen's property as determined by the state district court. Liability of the City for the taking was already established without the benefit of a jury trial. Under Rooker-Feldman, these claims could not result in invalidating the state court judgment. The district court, and Eighth Circuit, unfortunately, simply lumped them all together and focused exclusively on the state condemnation case. Gisslen's case is more akin to the Ninth Circuit's analysis in Kougasian v. TMSL, Inc., 359 F. 3d 1136 (9th Cir. 2004), because his federal complaint raised civil rights claims against adverse parties with no interest in the state case.

The Eighth Circuit apparently recognized that Gisslen's claims against Joselyn, Dulgar and Mathisen focused upon legal wrongs committed by them against Gisslen, instead of an allegation that he was wronged by an erroneous decision of the state court. This could explain why the Eighth Circuit went to the bother of determining, without any supporting caselaw, that Gisslen could have added his Section 1983, 1985 and 1986 claims against Joselyn, Dulgar and Mathisen in the condemnation case. Rooker-Feldman, however, does

not come into play when the federal claim asserts a wrong caused by an adverse party rather than by the state court judgment. Under the Ninth Circuit's analysis of Rooker-Feldman, subject-matter jurisdiction in federal court is not lost when the federal plaintiff is not complaining of legal injury caused by a state court judgment. *See* Kougasian; Noel v. Hall, 341 F.3d 1148 (9th Cir. 2003).

The ability of a plaintiff to bring claims for 42 U.S.C. Sections 1983, 1985 and 1986 for a legal wrong by an adverse party should not vary depending on the Circuit in which the federal district court sits. The court's original jurisdiction allows federal civil rights claims in federal court for legal wrongs and compensatory and punitive damages caused by the adverse parties named, including the City, Joselyn, Dulgar and Mathisen.

On March 5, 2004, the Eighth Circuit again applied Rooker-Feldman to bar subject-matter jurisdiction in Johnson v. City of Shorewood, et al, 360 F.3d 810 (8th Cir. 2004). Citing Gisslen, the Court held that Rooker-Feldman barred subject-matter jurisdiction of the federal court because the Johnsons were essentially challenging the state judgment as inadequate and were "asking the federal court for the same remedy requested in the state court action: just compensation". Again, this misstates Gisslen's federal Complaint that alleged, *inter alia*, violations of 42 U.S.C. Sections 1983, 1985, and 1986 for free speech, equal protection, substantive due process, conspiracy and neglect to prevent conspiracy, seeking compensatory and punitive damages.

The Third Circuit took a rudimentary approach to Rooker-Feldman in Exxon Mobil Corp. v. Saudi Basic Industries Corp., 2004 U.S. LEXIS 5485 (3d Cir. 2004), decided March 24, 2004, denying subject-matter jurisdiction when the same

claims were brought in the federal action. The Seventh Circuit rejected Rooker-Feldman in Garcia v. Village of Mount Prospect, et al, 360 F.3d 630 (7th Cir. 2004), decided February 23, 2004, and, instead applied res judicata. In Garcia, the district court dismissed the case for lack of subject-matter jurisdiction under Rooker-Feldman. The Seventh Circuit held that the plaintiff had a full and fair opportunity to litigate his federal civil rights claims under Title VII, and 42 U.S.C. Sections 1981 and 1983, because the state court could have exercised jurisdiction over his federal civil rights claims either directly or after plaintiff exhausted his administrative review from a police pension board's denial of benefits and joined the claims in state court. In rejecting Rooker-Feldman, the Seventh Circuit noted that the plaintiff's injury was not caused by the state-court judgment. Garcia, supra, n.5. Gisslen was denied a reasonable opportunity to litigate his federal claims.

The Supreme Court has never, outside of Rooker and Feldman themselves, employed the doctrine to hold that a federal district court is without subject matter jurisdiction. Noel, at 1158-59. The Court has barely discussed the doctrine since its decision in Feldman, although in three later cases it has held that the doctrine does not apply. Id; *see* Verizon Maryland, Inc. v. Public Service Commission, 535 U.S. 635, 644 n. 3, 152 L.Ed. 2d 871, 122 S.Ct. 1753 (2002)(holding Rooker-Feldman does not apply to a suit in which review is sought in federal district court of "executive action, including determinations made by a state administrative agency"); Johnson v. DeGrandy, 512 U.S. 997, 1006, 129 L.Ed. 2d 775, 114 S.Ct. 2647 (1994)(Rooker-Feldman does not apply to a federal court suit brought by a non-party to the state court suit); Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 95 L.Ed.2d 1, 107 S.Ct. 1519 (1987)(Court did not dismiss for lack of jurisdiction, but rather abstained

under Younger v. Harris)(Scalia, J., concurring)("I do not believe the so-called Rooker-Feldman doctrine deprives the Court of jurisdiction...."). Instead of applying Rooker-Feldman full steam as some Circuit Courts have done to deprive lower courts of subject matter jurisdiction, this Court has applied the doctrine sparingly. The Court should review this case to instill the same approach for all federal Circuit Courts and district courts.

Plaintiffs alleging violations of federal civil rights pursuant to 42 U.S.C. Sections 1983, 1985 and 1986 against new parties in order to obtain relief and damages not available in a state court case, and not seeking to change the state court judgment, should have the benefit of the subject matter jurisdiction of the federal courts. Denying Gisslen's federal claims subject-matter jurisdiction in federal court deprives him of his Seventh Amendment right to trial by jury on liability and damages as well as remedies and damages not available in the state condemnation proceeding. Rooker-Feldman was fashioned to prevent de facto appeals of unfavorable state court judgments, not to deprive plaintiffs of their day in federal court for legitimate claims not available in the state court case. Rooker-Feldman has become a sword to destroy the right to litigate viable claims in federal court. Plaintiffs should receive their Seventh Amendment right to trial by jury in federal court for damages claims. Cases should be decided on their merits and the federal court s open to all citizens. This Court should now resolve the continuing inconsistencies and conflicting application of Rooker-Feldman among the Circuit Courts.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this honorable Court grant his petition for rehearing of his petition for writ of certiorari.

Dated: April 22, 2004

Respectfully submitted,

Stephen Charles Fiebiger
Counsel of Record
Attorney for Petitioner

CERTIFICATE OF COUNSEL

I, Stephen C. Fiebiger, certify as follows:

1. I am the attorney for Petitioner in this case. I prepared this Petition for Rehearing of Petition for Writ of Certiorari.

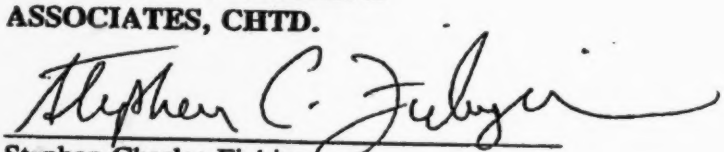
2. Pursuant to Rule 44.2 of the Supreme Court Rules, I certify that I have limited this Petition for Rehearing to intervening circumstances of a substantial; or controlling effect or to other substantial grounds not previously presented.

3. This Petition is presented in good faith and not for the purpose of delay.

Dated: April 22, 2004

Respectfully submitted,

STEPHEN C. FIEBIGER & ASSOCIATES, CHTD.



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